No. 32.

United States Circuit Court of Appeals,

Ninth Circuit.

HORATIO T. BARLING ET AL.,

PLAINTIFFS IN ERROR.

vs.

BANK OF BRITISH NORTH AMERICA,

DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

CARTER P. POMEROY,
For Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HORATIO T. BARLING AND JAMES EVA,
Plaintiffs in Error,

vs.

THE BANK OF BRITISH NORTH AMERICA,
Defendant in Error.

STATEMENT OF THE CASE.

This action was brought in the United States Circuit Court, by the Bank of British North America, a foreign banking corporation, doing business in San Francisco, California, against Horatio T. Barling and James Eva, citizens of California, to enforce their individual liabilities, as stockholders of the Alaska Improvement Company, for certain indebtedness of the last named company.

The facts of the case are undisputed, and are as follows:

The Alaska Improvement company, a California corporation, drew three inland bills of exchange, payable to its own order, on the firm of William T. Coleman & Company, all the members of which were citizens of California. Each of these bills of exchange, prior to its delivery, was indorsed in blank by the Alaska Improvement Company. After being so indorsed by it, the Alaska Improvement Company delivered the bills to the firm of William T. Coleman & Company, who in due course of business, before maturity, and at a place outside the territorial limits of Cali-

fornia, transferred them to the Bank of British North America. Subsequently, each of the bills was accepted by William T. Coleman & Company. At maturity, the bills were not paid by the acceptors and were protested, and notice given to the Alaska Improvement Company. The bills not being paid by the last named company, this action was brought to recover of the plaintiffs in error, stockholders in the Alaska Improvement Company, the respective amounts for which they are each individually liable on account of the liability of the Alaska Improvement Company on the bills in question. The action is based on the provisions of Section 322 of the Civil Code of California, which provides that "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation."

Judgment as prayed for was rendered in the Circuit Court in favor of the Bank of British North America, to review which the present writ of error was taken.

After the service of summons upon him, one of the plaintiffs in error, James Eva, interposed a plea in abatement, setting up the alleged failure of the Bank of British North America to file and publish the statements required by the California statute of April 1, 1876, entitled, "An Act Concerning Corporations, and persons engaged in the business of Banking," and claiming that by reason of such failure the Bank of British North America had not the right to maintain the present action. (See Trans., p. 13.) The Act in question, so far as pertinent to this controversy, is as follows:

"Section 1. Every corporation * * * hereafter doing a banking business in this State, shall in January and July of every year, publish * * * and also file for record * * * a sworn statement * * * of the amount of capital actually paid into such corporation. * * *

Sec. 2. Every corporation * * * hereafter doing a banking business in this State shall likewise publish in such newspaper * * * and shall also file for record * * *

in January and July of each year, a like sworn statement of the actual condition and value of its assets and liabilities, and where said assets are situated.

Sec. 3. The directors of every such corporation which shall publish or file for record, as aforesaid, a false statement of the amount of capital actually and *bona fide* paid into such corporation, or a false statement of the actual condition and value of its assets and liabilities, or as to where said assets are situated, shall be jointly and severally liable to any person thereafter dealing with such corporation to the full extent of such dealing; and no corporation and no person or persons who fail to comply with the provisions of this law, shall maintain or prosecute any action or proceeding *in any of the Courts of this State* until they shall have first duly filed the statements herein provided for, and in all other respects complied with the provisions of this law; nor shall any assignee or assignees of any such corporation, or persons whose assignments shall be made subsequent to any such failure to comply with the provisions of this law, maintain any action or proceeding in any court of this State until his or their assignor or assignors shall have first duly complied with the provisions of this law."

To this plea in abatement, the Bank of British North America, in compliance with Rule Nine of the Rules of the Circuit Court for this Circuit, demurred on the ground that the plea did not state facts sufficient to constitute a defense or an abatement of the action. The Court sustained the demurrer (Trans., p. 16); and its ruling in this regard is the first assignment of error. (Trans., p. 33.) The opinion of the Court on sustaining this demurrer is reported in *Bank of British North America* v. *Barling*, 44 Fed. Rep. 641, and is also embodied in the Transcript at page 30.

Afterwards the defendants demurred to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and on the ground that the Circuit Court had no jurisdiction of the person of the defendants or the subject of the action. This demurrer was overruled, the opinion thereon being reported in *Bank of British North America* v. *Barling*, 44 Fed. Rep. 641. As this

opinion is not embodied in the record, it is annexed at the end of this brief.

The defendants then answered to the merits, formally denying a few of the material allegations of the complaint, and setting up as a special defense that the plaintiff could not maintain the action for the reason that the Alaska Improvement being a corporation existing under the laws of the State of California, and the members of the firm of William T. Coleman & Company being each citizens of that State, the Circuit Court had no jurisdiction of the action. The Court overruled this defense, and rendered judgment for the plaintiff. This opinion is not yet officially reported, but will be found annexed to this brief at pages . The rulings of the Circuit Court in overruling the demurrer to the complaint, and in rendering final judgment for the plaintiff, although assigned as separate errors (Trans., p. 33), each present the same legal question as to the jurisdiction of the Circuit Court under the Judiciary Act of 1887, over the action, and will be considered together.

ARGUMENT.

First.

The error, if any, in sustaining the demurrer to the plea in abatement, was waived by the subsequent answer to the merits, and cannot be reviewed in this Court.

As heretofore stated, the plaintiff in error, James Eva, filed a plea in abatement by which he questioned the right of the defendant in error to maintain this action, for the reason that it had failed to comply with the requirements of the California Statute of April 1, 1876, as to filing and publishing the statements specified in that act. By the Ninth rule of the Circuit Court, the defense thus attempted to be set up was required to be raised by a plea in abatement, and in accordance with the same rule, the sufficiency of the plea in point of law to constitute a defense in abatement of the action, was raised by a demurrer. The Circuit Court sustained the demurrer, thus ruling against the sufficiency

of the plea. The defendants afterwards answered to the merits and by so doing they waived the plea in abatement as well as the right to so plead.

See rules of the U. S. Circuit Court, Ninth Circuit, Rule 9.

Railroad Company v. *Harris*, 79 U. S. 65-84;
Imperial Refining Co. v. *Wyman*, 38 Fed. Rep. 574;
Cuthbert v. *Galloway*, 35 Fed. Rep. 466;
United States Revised Statutes, § 1011;
Stephens v. *Monongahela Bank*, 111 U. S. 197.

SECOND.

The Court did not err in sustaining the demurrer to the plea in abatement, for the reasons (1) *That the California Statute of April* 1, 1876, *does not apply to actions brought in the Federal Courts, and* (2) *because the statute does not apply to actions with respect to business done by a banking corporation outside the territorial limits of the State of California.*

Assuming, however, that the ruling on the plea in abatement can be considered on this writ of error, the question of law thus raised is this: Is it necessary for an alien banking corporation, doing business in California, to file and publish the statements mentioned in the Act of April 1, 1876, as a condition precedent to its right to maintain an action in the Federal Courts? The defendant in error confidently asserts, both on principle and authority, that the statute does not affect its right to maintain the present action, for the following reasons:

1. THE STATUTE DOES NOT, EITHER EXPRESSLY OR IMPLIEDLY, PURPORT TO APPLY TO THE UNITED STATES COURTS, OR TO REGULATE THE RIGHT TO BRING OR MAINTAIN ACTIONS THEREIN.

The truth of this assertion is apparent upon the most cursory examination of the statute, and no amount of analysis could make it plainer. The statute does not pretend to interdict the carrying on of the banking business, nor attempt to invalidate any acts done in the prosecution of such business, in the event that the statements are not filed and pub-

lished. It merely provides that the required statements shall be filed and published as a condition to the right to maintain an action in any of the courts of the State of California. The language of the statute expressly limits the inhibition to actions in the State courts, and does not even attempt to extend it to actions brought in the courts of the United States. The language of the statute imposing the inhibition reads, "in any of the courts of *this State.*" The words, "this State" have reference solely to the State of California, and the words, "courts of this State," refer solely to the State courts of California. They do not apply, and should not be construed as intended to apply, to the Federal Courts, which are in no sense courts of the State of California. That this construction of the statute is correct, is settled by abundant authority.

See *Orange National Bank* v. *Travers*, 7 Fed. Rep. 146;
Union Trust Co. v. *Rochester*, 29 Fed. Rep. 609;
Phelps v. *O'Brien Co.*, 2 Dillon, 518.

2. IF THE STATUTE, IN EXPRESS TERMS, HAD ATTEMPTED TO MAKE THE FILING AND RECORDING OF THE STATEMENTS A PREREQUISITE TO THE RIGHT TO MAINTAIN AN ACTION IN THE FEDERAL COURTS, SUCH CONDITION WOULD BE VOID.

The rule is well settled, by an overwhelming array of authority, that the jurisdiction of the United States Courts cannot be limited or curtailed by State legislation, and that where the Judiciary Act of the United States confers jurisdiction on the United States Courts, by reason of diverse citizenship or alienage, the jurisdiction so conferred is unaffected by State legislation which either expressly or impliedly attempts to impose restrictions or limitations upon the right to invoke that jurisdiction, or even by State statutes which expressly require actions of a particular nature to be brought in the State courts.

See Foster's Federal Practice, § 6;
Phelps v. *O'Brien Co.*, 2 Dillon, 518;
Davis v. *James*, 2 Fed. Rep. 618;
Orange National Bank v. *Travers*, 7 Fed. Rep. 146;
Hall v. *Devoe Mfg. Co.*, 14 Fed. Rep. 183;

Union Trust Co. v. *Rochester*, 29 Fed. Rep. 609;
Railroad Co. v. *Whitton*, 13 Wall. 270;
Hyde v. *Stone*, 20 How. 170;
Ex parte Biddle v. 2 Mason, 472;
Keary v. *Farmers' etc. Bank*, 16 Peters. 89;
Pulliam v. *Pulliam*, 10 Fed. Rep. 27;
Suydam v. *Broadnax*, 14 Pet. 67;
Union Bank v. *Jolly's Admr.*, 18 How. 506;
Payne v. *Hook*, 7 Wall. 425.

In each of these cases, the question whether State legislation could impose conditions upon the right given by the United States Judiciary Act to invoke the jurisdiction of the Federal Courts was involved, and in each case the authority of the State was denied.

In *Phelps* v. *O'Brien Co.*, 2 Dillon, 518, jurisdiction of the Circuit Court of Iowa was invoked by reason of the diverse citizenship of the plaintiff, who sued on a judgment rendered by a *State* Court of Iowa. A provision of the Code of Iowa provided that no action should be brought upon any judgment rendered in any court of that State "without leave of the Court for good cause shown and on notice to the adverse party." The defendant demurred to the complaint on the ground that this condition of the statute had not been complied with. In disposing of the question thus raised, Dillon, J., after quoting the provision of the Judiciary Act conferring jurisdiction on the United States Courts in cases of adverse citizenship, said:

"The case made in the petition falls within the jurisdiction of this Court as thus prescribed, and this jurisdiction cannot be in any manner limited or affected by State legislation. But in cases at common law properly cognizable in this Court, the laws of the several States, where applicable, form rules of decision here,—as, for example, the limitation laws of the States are as available to a defendant in this Court as in the State courts where there is no Act of Congress to the contrary. It is our opinion that the section of the Code above mentioned is and must be limited to suits in the State courts of the character therein contemplated. A

person who has the right, under the Constitution and laws of the United States to bring his action in this Court, cannot be compelled first to obtain the leave of a State court. In principle, this case is settled by several adjudications of the Supreme Court of the United States" (citing several of the cases cited above).

In *Union Trust Co.* v. *Rochester*, 29 Fed. Rep. 609, the Circuit Court of Pennsylvania said of an identical statute; "The New York statutory provisions forbidding suit to be brought upon a judgment rendered in a court of record of that State without a previous order of the court in which the original action was brought, granting leave to bring the new suit, must be held as intended only to regulate the course of procedure in the New York State courts. Such was the conclusion of Judges Dillon and Love in respect to a similar statute of the State of Iowa (*Phelps* v. *O'Brien Co.*, 2 Dill. 518). It is an established principle that State legislation cannot in anywise impair or limit the jurisdiction of the courts of the United States."

In Orange National Bank v. *Travers*, 7 Fed. Rep. 146, the effect of a State statute prohibiting a foreign corporation from "transacting business in this State"—Oregon,—until it had appointed a resident agent, was involved. In discussing this question, Deady, J., after holding that the inhibition of the statute did not preclude the right to follow a debtor and sue him in the courts of the State, said: "But the plaintiff, if a foreign corporation at all, is a citizen of Massachusetts, the place of its organization and business, and is therefore entitled under the Constitution and laws of the United States, to sue in this court on account of its citizenship; and this right cannot be limited or restrained by the State."

In *Davis* v. *James*, 2 Fed. Rep. 618, a State statute providing that guardians might be licensed to mortgage the estates of their wards, but that foreclosure of such mortgages should only be by petition to certain State courts, was held not to preclude the bringing of such suit in the United States Courts.

In *Hall* v. *Devoe Mfg. Co.*, 14 Fed. Rep. 183, the general doctrine was announced as settled that the extent of the jurisdiction of the United States Courts cannot be restricted or enlarged by State legislation.

In *Hyde* v. *Stone*, 20 How. 175, the Supreme Court of the United States said: "This Court has repeatedly decided that the jurisdiction of the Courts of the United States over controversies between citizens of different States can not be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial powers."

In *Watson* v. *Tarpley*, 18 How. 520, the Supreme Court of the United States, in commenting upon a State statute which imposed a condition upon the right to maintain actions in a certain class of cases. said: "It is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of Courts of the United States as vested and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right to resort to those courts has been secured by the laws and constitution. This is a position which has been frequently affirmed by this Court, and would seem to compel the general assent upon its simple enunciation."

See also *Cowles* v. *Mercer County*, 7 Wall. 118.

3. THE STATUTE OF APRIL 1, 1876, SHOULD NOT BE CONSTRUED AS AFFECTING THE RIGHT OF A BANKING CORPORATION TO SUE FOR THE ENFORCEMENT OF A CAUSE OF ACTION WHICH IT ACQUIRED THROUGH BUSINESS DONE BY IT OUTSIDE OF THE STATE OF CALIFORNIA, ALTHOUGH THE CORPORATION MAY HAVE BEEN ENGAGED IN TRANSACTING OTHER BANKING BUSINESS IN CALIFORNIA.

Conceding, for the sake of argument, that the statute in question limits the right of maintaining actions in the Federal as well as in the State Courts, nevertheless it is without application to the present case, for the reason that the "banking business" done by the defendant in error, out of which the liability of the plaintiffs in error arose, was done by it in a State foreign to California.

The complaint shows on its face—and the facts there alleged in this connection are admitted by the plea in abatement—that the Bank of British North America bought the bills of exchange on which the action is founded in Vancouver, British Columbia. The action is, therefore, in contemplation of law, brought by a foreign corporation to enforce its rights under contracts made out of the State of California, and using the Circuit Court of the United States for the Northern District of California solely because of the residence here of the plaintiffs in error. Of course, as a foreign corporation, the defendant in error had the right to sue in the Federal Court. This right is accorded it by express provisions of the Constitution and of the Judiciary Act. The accident that the defendant in error does or has done other "banking business" in California, and as to such other business done in California, is amenable to the restrictions and regulations imposed by the statute on such business, should not deprive it of the right, accorded to all foreigners, of pursuing their remedies against residents of this State, upon contracts made out of this State. The Act by its express terms is directed to corporations and persons doing a banking business in this State, and is designed as a regulation of banking business done in this State. As to all other business the foreign corporation is not doing business in this State, and has the same unrestricted privilege of recourse to the Federal Courts as any other foreigner.

That this is the proper and only reasonable construction that can be given the statute is plainly seen from the absurdities to which the contrary construction would lead. For instance: suppose a foreign banking corporation, like the defendant in error, doing business in all quarters of the world, and among other places in California, should purchase negotiable instruments in a foreign country, to which a citizen of California was a party, and in the course of its business should transfer them to other foreign parties, not bankers, and they in turn to others, and that finally the holder of the instruments should bring suit thereon in California, to enforce the liability of the citizen of California.

In this supposed case all of the business was done in foreign countries. Yet if the position assumed by the plaintiff in error's plea in abatement is sound in law, and founded on a proper construction of the statute of April 1, 1876, the action could not be maintained if the intermediate party to the instrument, who also did other banking business in California, had neglected to file a sufficient statement under the act of April 1, 1876, because by the last clause of Section 3 of that act the inhibition against sueing is made applicable to assignees, when their assignors have failed to comply with the act.

The act should certainly not be so construed as to produce this absurd and iniquitous result—a result that would revolutionize the laws of commercial paper and destroy the safeguards which for centuries have been established for the protection of the holders of negotiable instruments.

That the construction of the act contended for by the plaintiff is proper, is further demonstrated when it is remembered that the act is highly penal, and under all rules of construction applicable to statutes of that character should be strictly construed against the incurring of the penalty. All intendments are to be resolved in favor of the class of corporations or persons against whom it was designed to operate, and no intendments are to be presumed in favor of any person seeking to enforce a penalty under it. If a reasonable construction can be given to the language of the act which would relieve from the penalty in a given case, such a construction is the proper one to be given.

See Sedgwick on Statutory Construction, p. 324 *et seq.;*
Dwaries on Statutes, p. 634;
Wood v. *Meeks*, 7 Lea (Tenn.) 40;
Garrison v. *Howe*, 17 N. Y. 466;
Vhan v. *Ford*, 77 N. Y. 168;
Bonnell v. *Griswold*, 80 N. Y. 128;
Gray v. *Coffin*, 9 Cush. 199;
Steadman v. *Eveleth*, 6 Metc. 114;
Cabre v. *McClure*, 29 Mo. 371;
Whitaker v. *Masterson*, 106 N. Y. 277;

Whitney Arms Co. v. *Barlow*, 63 N. Y. 62; 68 N. Y. 34;
Derruckson v. *Smith*, 27 N. J. L. 126;
Peer v. *Hanmore*, 86 N. Y. 95.

Being penal, the statute should not be construed so as to give it an extra-territorial effect.

See *Derruckson* v. *Smith*, 27 N. J. L. 126;
Wood v. *Meeks*, 7 Lea (Tenn.) 40.

It was contended in the lower court by the plaintiffs in error that the policy of the act of April 1, 1876, was to afford notice of the condition of the banking corporation to persons dealing with it, and that for this reason the act should be construed to affect any and all causes of action, wherever acquired, which are sought to be enforced in the State of California. Assuming that this was the intent of the statute, the whole argument of the plaintiffs in error on this point tends irresistibly to the conclusion that the statute was not designed to be given an extra-territorial force so as to affect business done outside of this State, because under no possible circumstances could the statements filed and published in San Francisco, be notice to persons dealing with the bank in a foreign country. On the plaintiffs in error's own theory of interpretation, the intent of the statute being to furnish notice, the statute was not and should not be construed so as to affect the right of the bank to sue for the enforcement of rights which it acquired in foreign countries.

It was also contended by the plaintiffs in error in the lower court, that the present case falls within the principle laid down in such cases as *Ex parte Scholenberger*, 96 U. S. 369, and *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 733, in which State statutes imposing restrictions upon the rights of foreign corporations to do business in the State were recognized and enforced in the Federal Courts. With regard to these authorities cited by the plaintiffs in error this only need be said for the purpose of distinguishing them from the present case:

The Federal Courts enforce primary rights of property conferred by the laws of the States. State statutes conferring primary property rights, or State statutes absolutely prohibiting corporations from acquiring such rights, or prescribing limitations upon the acquisitions of such rights, are binding on the Federal Courts, so far as they do not conflict with Federal laws or with the Constitution. In other words, the primary rights in and to property which persons and corporations may acquire are ordinarily determined by the private municipal law of the States. These rights are enforceable in the Federal Courts by the remedies and modes of procedure provided for by the U. S. Constitution and the Federal Judiciary Acts. The right to invoke the aid of the Federal Courts for the enforcement of such rights is conferred by the Federal Judiciary Act and by the Constitution on certain classes of persons, among others on aliens. It is the privilege of sueing in the United States Courts that the State Legislature cannot limit or restrict, notwithstanding the right sought to be enforced is one given by the State private municipal law. Of course any State statute prohibiting persons or corporations, under given circumstances, from acquiring any right in or to property, if not unconstitutional, would be binding on the Federal Courts. Such statutes, for example, are statutes prohibiting corporations or persons from acquiring real estate, or more than a given amount of real estate, or statutes prohibiting corporations from doing business in the State until they have complied with the statutory conditions imposed on them. This latter kind of statute has been upheld on the ground that the inhibition imposed by the statute prevents the corporation from acquiring any property right or cause of action, enforceable in any court, until the statutory conditions have been complied with. The Federal Courts uphold such statutes, and refuse relief to suitors sought in contravention of their terms, solely on the ground that no property right has been acquired, and not on the ground that the State Legislature can impose limitations or restrictions on the right of persons, otherwise entitled, to sue in the Federal Courts.

The cases cited by the plaintiffs in error are all cases of this kind.

The statute involved in the present case, as appears upon the most casual inspection, is not of this character. The statute nowhere declares that acts done by banking corporations in contravention of its terms shall be void, or confer no rights upon them. The penalty imposed is simply a temporary abatement of the right to maintain a suit for the enforcement of an existing cause of action until the statements have been first published and filed. The statute is plainly a mere limitation on the right to apply to the courts for relief, and such being its intent, is wholly inoperative as to the Federal Courts.

It was urged by the plaintiffs in error, in the lower court, that the cases relied upon by the defendant in error, which denied the power of State legislation to restrict the rights of litigants to resort to the Federal Courts were equity cases, as distinguished from actions at law. This is not true. Some of the cases cited by the defendant in error—as for example the cases on judgments rendered by State courts—were actions at law in the strictest sense. Some of the cases cited were equity cases. This shows that the rule that State legislation cannot restrict the right to sue in the Federal Courts, where such right is expressly given by the Federal Statute, applies both to actions at law and to suits in equity.

The views thus far advanced in this brief were adopted by the Circuit Court in its opinion on the demurrer to the plea in abatement.

THIRD.

The Second and Third Assignments of Error, to the effect that the Circuit Court had no jurisdiction to entertain the present action, cannot be reviewed by the Circuit Court of Appeals.

The second assignment of error, to wit: the alleged error in overruling the demurrer to the complaint, and the third assignment of error, to wit: the alleged error in rendering judgment for the defendant in error, each depend for their solution upon the question, whether under Section 1 of the Judiciary Act of 1887, as amended in 1888, the Circuit

Court has jurisdiction of an action brought by an alien, who is an assignee of choses in action made by a corporation, and originally payable to bearer, to enforce the statutory liability of the stockholders of such corporation for such corporate indebtedness, although the assignor of the plaintiff could not have maintained such action. It is apparent that these assignments of error make "a case in which the jurisdiction of the Court is in issue," within the meaning of Section 5 of the Act of Congress of March 3, 1891. By that section the appellate jurisdiction to review such cases is exclusively given to the Supreme Court of the United States, and is expressly denied to the Circuit Court of Appeals. By the express language of that Act it is provided "that appeals or writs of error may be taken from the District Courts or from the existing Circuit Court direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." * * * By the very next section (Section 6), which defines the jurisdiction of the Circuit Court of Appeals, the appellate jurisdiction to review by appeal or by writ of error final decisions in the District and existing Circuit Courts is limited to "all cases *other than those provided for in the preceding section of this Act.*" By every principle of statutory construction, the apt language of exclusion found in Section 6 of the Act, denies to the Circuit Court of Appeals any appellate jurisdiction to review an assignment of error which attacks the jurisdiction of the Circuit Court.

See Act of March 3, 1891, Secs. 5 and 6.

See also *U. S.* v. *Sutton*, 47 Fed. Rep. 129, where this point was directly decided by Judge Sawyer.

Also, McLish, 139 U. S. 668

FOURTH.

The Circuit Court had jurisdiction of the present action, under Section 1 *of the Judiciary Act of* 1887, *as amended in* 1888.

Assuming, however, for the sake of the argument, that this Court has jurisdiction to review the assignments of error which attack the jurisdiction of the Circuit Court, and

still it is confidently asserted that these assignments of error are without merit. For a proper understanding of the points thus made it will be convenient to repeat the facts upon which they depend, which are as follows:

The Alaska Improvement Company, a California corporation, drew three inland bills of exchange, payable to its own order, on the firm of William T. Coleman & Co. Each of these bills of exchange, prior to its delivery, was indorsed in blank by the Alaska Improvement Company. After being so indorsed by it, the Alaska Improvement Company delivered the bills to the firm of William T. Coleman & Co., citizens of California, who in due course of business, before maturity, transferred them to the defendant in error, a foreign corporation, at a place outside the territorial limits of California. Subsequently, each of the bills was accepted by William T. Coleman & Co. At maturity, the bills were not paid and were protested, and notice given to the Alaska Improvement Company. The bills not being paid by the last-named company, this action was brought to recover of the plaintiffs in error, stockholders in the Alaska Improvement Company, the respective amounts for which they are each individually liable by reason of the liability of the Alaska Improvement Company on the bills in question. The action is based on the provisions of Section 322 of the Civil Code of California, which provides that "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation."

Upon this state of facts, it is contended by the plaintiffs in error that the Circuit Court has no jurisdiction of the action, because the firm of William T. Coleman & Co., through whom the defendant in error derived title to the bills, were citizens of California, and could not have maintained an action on the bills against the Alaska Improvement Company in the Circuit Court, and that consequently the defendant in error could maintain the present action in

the Circuit Court against the plaintiffs in error on their stockholder's liability. In support of their contention, the plaintiffs in error rely on that provision of Section 1 of the Judiciary Act of 1887, as amended in 1888, which reads as follows:

"Nor shall any circuit or district court have cognizance of any suit, * * * to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

To this contention there are several conclusive answers, each of which is amply sufficient to uphold the jurisdiction of the Court with respect to the present suit.

1. IF THE ACTION BE CONSIDERED AS AN "ACTION BY AN ASSIGNEE" AND "TO RECOVER THE CONTENTS OF A CHOSE IN ACTION," WITHIN THE MEANING OF THOSE TERMS AS USED IN THE JUDICIARY ACT ABOVE QUOTED, IT MAY NEVERTHELESS BE PROPERLY MAINTAINED IN THE CIRCUIT COURT BY THE ASSIGNEE, ALTHOUGH THE ASSIGNORS WERE DISQUALIFIED FROM SUING THERE, FOR THE REASON THAT THE BILLS OF EXCHANGE IN QUESTION WERE "CHOSES IN ACTION" MADE BY A CORPORATION AND PAYABLE TO BEARER.

The construction which has uniformly been put upon the provision of the Judiciary Act of 1887–88, in question, recognizes the jurisdiction of the Circuit Court of the United States in actions brought by assignees, although their assignors were disqualified from their suing, in all actions where the assignee sues to recover the contents of a chose in action which was originally payable to bearer, and which was made by a corporation. The correctness of this contention is fully sustained by every case which has thus far been determined by the respective Circuit Courts of the United States, involving the construction of this provision of the Judiciary Act.

See *Newgass* v. *New Orleans*, 33 Fed. Rep. 196;
Rollins v. *Chaffee County*, 34 Fed. Rep. 91;

Wilson v. *Knox County*, 43 Fed. Rep. 481;
Aylesworth v. *Gratiot County*, 43 Fed. Rep. 355;
Bank of British North America v. *Barling*, 46 Fed. Rep. 357.

In *Newgass* v. *New Orleans*, 33 Fed. Rep. 196, an assignee, who was an alien, brought suit on certain corporate choses in action, some of which were originally payable to bearer, and others of which were not. In sustaining the jurisdiction as to the choses in action which were originally payable to bearer, and denying it as to the others, the Court said:

"The restriction, after excluding from its operation 'foreign bills of exchange,' deals with all other choses in action. Those rights of action which required an assignment were excluded from the jurisdiction, unless the assignor could have prosecuted the action to recover thereon before the assignment. Those choses in action which did not require any express assignment because they were payable to bearer, and thus passed by delivery, were also excluded from the jurisdiction, unless made by some corporation, if the transferee could not have maintained suit thereon before transfer. The construction of the restriction may also be stated thus: The Circuit Court shall have no jurisdiction over suits for the recovery of the contents of promissory notes or other choses in action brought in favor of assignees or transferees except over,—*First*, suits upon foreign bills of exchange; *Second*, suits that might have been prosecuted in such court to recover said contents, if no assignment or transfer had been made; *Third*, *suits upon choses in action payable to bearer, and made by a corporation*."

In *Rollins* v. *Chaffee County* and *Barnum* v. *Custer County*, 34 Fed. Rep. 91, the plaintiffs, as assignees, brought suit on two classes of county warrants, of which one class were originally payable to a person named therein or *to his order*, and the other class were payable to a person named therein *or to bearer*. The counties which issued the warrants were, of course, corporations. In the pleadings nothing was alleged as to the citizenship of the plaintiff's assignors, the original payees. Under the well-settled rule that the juris-

diction of the court must affirmatively appear by the pleadings, the question was thus squarely presented whether the Court had jurisdiction of the suits. In rendering his opinion, Hallett, J., followed the decision in *Newgass* v. *New Orleans*, above quoted, and sustained the jurisdiction of the court as to the warrants which were originally payable *to bearer*, and denied it as to the warrants which were originally payable *to order*.

In *Wilson* v. *Knox County*, 43 Fed. Rep. 481, Miller, J., approved the decisions in the foregoing cases, but held that the Court had no jurisdiction of that case, because the warrants in question, although made by a corporation, *were not payable to bearer*.

In *Aylesworth* v. *Gratiot County*, 43 Fed. Rep. 355, the action was brought by an assignee on certain county warrants, which were drawn payable to a named person "*or bearer*." The jurisdiction of the Court was assailed on the alleged ground that the instruments in question were not negotiable, and that as the plaintiff's assignor could not have sued thereon in the Circuit Court, the plaintiff was likewise debarred. The Court, however, held the instruments to be "payable to bearer and made by a corporation," and sustained the suit.

The case of *Bank of British North America* v. *Barling*, 46 Fed. Rep. 357, is the same case as the present, and presents identically the same questions of law. In that instance the questions of jurisdiction were raised by a demurrer to the complaint In its opinion, the Circuit Court expressly approved of the doctrines laid down in each of the foregoing cases, and held that it had jurisdiction of the case for the reason that the bills of exchange in question were originally payable to bearer and made by a corporation. The facts that the bills of exchange were drawn by the Alaska Improvement Company, *payable to its own order*,—in other words, that the drawee and payee of the bills was the same person,—and that the company, before the bills had ever been issued, and while they were inchoate contracts in its own hands, *indorsed them in blank*, the Court held, under the

well-settled rules applicable to commercial paper, gave to the bills the quality of *negotiability to bearer*, at the very instant that they became binding contracts; that is, at the moment they were delivered by the Alaska Improvement Company to the firm of William T. Coleman & Co. The modern authorities invariably hold that negotiable instruments in which the maker and payee is the same person, and which are indorsed by the maker in blank before delivery, are in law and in fact payable to bearer, - as much so as if they bore the express words "pay to bearer" on their face,—and governed by exactly the same legal rules, and may be so declared on in either civil or criminal pleadings. These authorities, or at least many of them, are referred to in the opinion of the Circuit Court on demurrer, but are repeated here for purposes of convenience.

See Tiedeman on Commercial Paper, Sec. 20, and cases cited;
Randolph on Commercial Paper, Secs. 153, 154, and cases cited;
Daniel on Negotiable Instruments, Sec. 130, and cases cited;
Scott v. *Edwards*, 13 Ark. 24;
Wilder v. *De Wolf*, 24 Ill. 190;
Irving Nat. Bank v. *Alley*, 79 N. Y. 536;
Smalley v. *Wright*, 44 Me. 442; 69 Am. Dec. 112;
Civil Code of California, Sec. 3102.

In the endeavor to escape from the conclusions reached in the foregoing cases, and from the decision reached in *Bank of British North America* v. *Barling*, 46 Fed. Rep. 357, the counsel for the plaintiffs in error attempted in the lower court to draw a distinction between cases in which the instrument is drawn "payable to bearer" and cases in which the instrument is merely "in effect" payable to bearer, and cited two cases in which, he asserted, this distinction was recognized by the Court in determining the question of jurisdiction in actions by assignees. The two cases in which this distinction is asserted to have been acted upon by the courts are the cases of *Rollins* v. *Chaffee County* and *Wilson* v. *Knox County*. That there is no such distinction on prin-

ciple—unless, perhaps, it is the distinction that always exists between "twedledum" and "twedledee"—is conclusively established by the authorities above cited, with respect to negotiable instruments. Indeed, it is impossible to follow the counsel for the plaintiffs in error on this branch of his argument, in his endeavor to distinguish between that which "is," and that which he claims "is" only "in legal effect." The law, in interpreting every contract, whether written or unwritten, is concerned with its "legal effect," and with that alone; and whatever the contract is "in effect," that the contract "is," no matter in what terms the contract may be expressed.

That the two cases relied on do not establish or in any way recognize such a distinction, the most casual inspection of the cases will demonstrate. The case of *Rollins* v. *Chaffee County* has already been quoted from at length, and need not be again examined. Suffice to say, that it admirably illustrates the occasions when an assignee can and when he cannot sue. Referring to the case of *Wilson* v. *Knox Co.*, the counsel for the plaintiffs in error makes a misstatement as to the facts of the case. Counsel say: "The instruments sued upon were county warrants payable *to blank*, and the assignment of them to the plaintiff was *in blank*. Such instruments were *in effect* payable to bearer, and passed by mere delivery."

It is thus sought to convey the impression that the Court, in refusing to entertain jurisdiction of that case, did so because the instruments were not *eo nomine*, drawn payable to bearer, and that payability to bearer, as the result of the fact that the instruments were drawn payable "to blank," was not held sufficient to confer jurisdiction. The whole argument of counsel is based upon the assumption that the county warrants sued on in that case were drawn payable "to blank,"—that is, without any payee being named in the instrument. This assumption is unsupported by the facts of that case, as an inspection of the report of that case, in 43 Fed. Rep., page 481, will show at a glance. The warrants there sued on were drawn payable to certain designated payees, but contained no words of

negotiability whatever,—that is, they were not made payable either "to order" or "to bearer." They were thus, as Justice Miller states in his opinion, "not even negotiable instruments under the law merchant," and consequently, although they were made by a corporation, the Court had no jurisdiction of the action by the assignee. Counsel may, perhaps, have been misled into asserting that these warrants were drawn payable "to blank," from the fact that in the statement of facts preceding the opinion a skeleton form of the warrants is given, in which the dates, names of parties and amounts are represented by a dash, as thus:——. It is apparent, however, that this form was inserted merely as an illustration of the general style of the warrants, and not to convey the idea that the warrants, as actually issued by the county, contained such blanks. Indeed, immediately preceding the form of the warrant, it is stated that "the dates, names of payees, amounts," etc., as they were in the respective warrants, are omitted from the form as given.

2. IF THE PRESENT ACTION BE CONSIDERED AS ONE TO ENFORCE THE STATUTORY LIABILITY OF THE DEFENDANTS AS STOCKHOLDERS, THE JURISDICTION EXISTS BECAUSE THE ACTION IS STILL FOUNDED UPON A CHOSE IN ACTION MADE BY A CORPORATION PAYABLE TO BEARER.

We have thus far argued this question of jurisdiction as if the action were technically on the bills of exchange, and the plaintiffs were suing as an assignee to recover their contents. This was the position assumed by the plaintiffs in error on their argument on the demurrer; but on the final submission of the cause in the Circuit Court they shifted their ground, and contended that the action is not based on the bills of exchange, but on the liability imposed by statute on them as stockholders of the Alaska Improvement Company, and upon the assignment of such liability to the defendant in error; that the right to enforce such statutory liability is a chose in action, and came to the defendant in error by assignment; and that as the assignor could not sue in the Federal Courts to enforce such liability, the assignee cannot, because, as to such stockholders, the liability sued on is not one made by a corporation and payable to bearer,

within the meaning of the Judiciary Act. This contention is not sustainable, either on principle or authority.

Under the laws of this State, every stockholder of a corporation is liable for his proportionate part of the debts and other liabilities of the corporation. (Civil Code, Sec. 322.) Repeated decisions of the Supreme Court of this State have established the doctrine—and counsel for the defendants so admit—that this liability of stockholders attaches to and enters into every contract made by the corporation, and every debt or liability incurred by it. It is a necessary incident thereof. Their liability is imposed on them not by any act or neglect of their own, but solely by reason of some act done, some contract made, or some neglect suffered by the corporation, and can never exist unless there is the corresponding liability of the corporation for such act, contract or neglect. Whatever cause of action, therefore, is sought to be enforced against a stockholder must be founded on a chose in action, made by a corporation, within the meaning of those words as used in the Judiciary Act. If this "chose in action" be made payable to bearer, all the conditions imposed by the Judiciary Act, with respect to the right of the assignee to sue, are complied with.

The correctness of these conclusions is sustained by the case of *Manufacturing Company* v. *Bradley*, 105 U. S. 175, which, so far as concerns this question of the jurisdiction of an action to enforce a stockholder's liability, in a case where the assignee could maintain an action against the corporation on its fundamental liability, out of which corporate liability the stockholders' liability arises, is directly contrary to the contention of the plaintiffs in error. This action was brought by the assignee of a negotiable instrument payable to bearer, made by a corporation, to recover the amount thereof, from the corporation, *and to enforce against the individual defendants their statutory liability as stockholders for the corporate debt sued on.* Both the corporation and the individual defendants, as well as the plaintiff's assignor, were citizens of South Carolina, in which State the action was brought. Of course, the plaintiff's assignor, by reason of the similarity of his citizen-

ship, could not have maintained the action in the Federal Courts, either against the corporation or the defendant stockholders. The defendants objected that the Court had no jurisdiction of the action, for the reason that the plaintiff was an assignee of a chose in action, and for that reason was inhibited from suing by the prohibition of the first section of the act of March 3, 1875. The Court unanimously held, however, that the action was founded on a promissory note negotiable by the law merchant, and was therefore excepted out of the prohibition of the statute; and the action was accordingly sustained on this ground not only against the corporation, *but also against the individual defendants, who were sued on their statutory stockholder's liability, and against whom individual judgments for their liability were rendered.*

It necessarily follows from this decision that, as the Circuit Court would have jurisdiction of an action brought by the defendant in error against the Alaska Improvement Company, to recover the contents of the bills of exchange, because such bills were made by a corporation and are payable to bearer, it must also, and for the same reasons, have jurisdiction of the present action, brought to enforce the liability of the plaintiffs in error as stockholders for such debt of the corporation.

The plaintiffs in error seek to weaken the force of this authority by distinguishing that case from the one at bar. That case is cited by us, as authority claimed to be directly in point, as a case where both the Circuit Court and the Supreme Court of the United States, had sustained an action by an assignee against stockholders to enforce their statutory stockholders liability, where the plaintiff and the defendant were citizens of different States, and the corporate liability was of such a nature that the Court would have had jurisdiction of an action founded thereon against the corporation.

Every word that the learned counsel for the plaintiffs in error says with respect to the present action being founded on the statute, and being an action to enforce a "statutory liability," and therefore not within the provision of the judiciary act authorizing suits by assignees on cor-

porate liabilities payable to bearer, is as equally applicable to the case of *Manufacturing Company* v. *Bradley*, as it is in the present case. In each case the stockholders liability was created by statute; and it is apparent that the action in that case, so far as the stockholders were concerned, was as much based on their statutory liability, as the cause of action in the present case can be said to be so based. And this is necessarily so, although the general nature of the statutory liability imposed by the statutes of South Carolina, may have differed from the liability imposed by the statutes of California. And yet, as we have seen, the Court in *Manufacturing Company* v. *Bradley*, held it had jurisdiction of the action over the stockholders, and rendered judgment against them, because the case was within the exception of the judiciary act with respect to suits by assignees. And this conclusion was reached, notwithstanding the question of the jurisdiction of the Court over the stockholders was directly raised by them by a plea in abatement to the jurisdiction. (See the opinion of the Circuit Court in that case, reported in 3 Hughes, 26.)

The argument by which the learned counsel for the plaintiffs in error seeks to weaken the effect of this authority is by asserting that the Court in the case referred to acquired jurisdiction over the stockholders solely for the purpose of preventing a multiplicity of suits. The idea evidently intended to be conveyed by the learned counsel is, that although the Court would have had no jurisdiction of an action against the stockholders alone, because such action would have been on a "statutory liability." it did have jurisdiction of an action in which the corporation and the stockholders were joined as defendants, in order to prevent a multiplicity of suits. The Court, in this case, in order to meet an objection made by the defendants that the corporation and the stockholders could not be sued in the same action,—that is, that the stockholders were not proper parties defendant,—did decide that the joinder was proper, in accordance with the general doctrines of equity jurisprudence, in order to prevent a multiplicity of suits. The fallacy of the learned counsel's assumption is at once apparent,

when it is remembered that the jurisdiction of the Circuit Court with respect to the parties that can be joined is limited by the restrictions of the Judiciary Act; and the mere fact that a given person would be a proper or a necessary party to a controversy, within the meaning of the rules of equity respecting the joinder of parties, is never sufficient to give the Circuit Court jurisdiction over such persons, unless such persons are embraced within some class mentioned in the Judiciary Act. This rule is fundamental, and lies at the very basis of the entire jurisdiction of the Federal Courts, where jurisdiction is invoked on account of diverse citizenship.

In *Manufacturing Company* v. *Bradley*, neither the opinion of the Supreme Court, nor that of the Circuit Court, contains any intimation that the fact that the action against the stockholders was on their "statutory liability" made any difference with respect to the jurisdiction of the Circuit Court over them. The opinion in the Circuit Court directly holds, in answer to the plea to the jurisdiction, that the Court has jurisdiction over the stockholders and directs judgment to be rendered against them. This judgment was affirmed by the Supreme Court. Now, it is a well recognized practice, both of the Circuit and of the Supreme Court, to always dismiss cases which come before them, of which they have not jurisdiction, whether an objection to the jurisdiction has been raised or not. The question of jurisdiction is always enquired into by them, and a decision of a cause on its merits is the equivalent to an affirmation that the jurisdiction exists. Had the Supreme Court in this case been of the opinion that the fact that the action as against the stockholders was on their statutory liability, made any difference as to the jurisdiction of the Circuit Court, it would have dismissed the action as to them. Not having done so, but on the contrary having upheld the jurisdiction over the stockholders, its action is equivalent to an affirmative decision that no such difference exists.

3. IF THE PRESENT ACTION BE CONSIDERED AS ONE TO ENFORCE THE STATUTORY LIABILITY OF THE DEFENDANTS, THE JURISDICTION MAY ALSO BE SUSTAINED, FOR THE REASON THAT THE CAUSE OF ACTION SUED ON NEVER EXISTED IN FAVOR OF ANY PERSON OTHER THAN THE PLAINTIFF, AND CONSEQUENTLY, AS TO SUCH CAUSE OF ACTION, THE PLAINTIFF DOES NOT SUE AS AN "ASSIGNEE," OR TO RECOVER THE "CONTENTS" OF ANY ASSIGNED CHOSE IN ACTION, WITHIN THE MEANING OF THE RESTRICTION CLAUSES OF THE JUDICIARY ACT OF 1887-88.

The learned counsel for the plaintiffs in error devotes the latter part of his brief to an attempted analysis of the respective liabilities of the Alaska Improvement Company and of its stockholders with respect to the bills of exchange in question, and reaches the conclusion that while William T. Coleman & Co. was the owner of the bills, that firm held the same rights against the Alaska Improvement Company and its stockholders as are now held by the defendant in error, and that the correlative liabilities of that corporation and its stockholders to the firm of William T. Coleman & Co. were then identical with the present liabilities of that coporation and its stockholders to the defendant in error. From this conclusion, the further conclusion is drawn that the defendant in error is an "assignee" of its present cause of action within the meaning of the Judiciary Act. The falsity of this argument consists in the assumption that because William T. Coleman & Co. once had title to the bills in question, and afterwards transferred them to the plaintiff, this transfer, and the subsequent events which happened with respect to the bills, conferred no greater or other rights on the defendant in error than those possessed by the firm of William T. Coleman & Co., and in the further assumption that the defendant in error's cause of action is necessarily based upon the assignment. The cases uniformly hold that although the plaintiff may be compelled to trace his title to the subject-matter of the action, through a third party, he is not an assignee within the meaning of the Judiciary Act, unless the identical cause of action sought to be enforced previously existed in favor of such third person against the defendants; and unless such identity does exist,

the action is not based upon the assignment. The courts hold that in such cases the fact of the assignment, although necessary to the plaintiff's cause of action, is merely matter of inducement.

A brief analysis of the defendant in error's cause of action will show that it is not suing on any cause of action that the firm of William T. Coleman & Co. ever had, either against the Alaska Improvement Company or against the plaintiffs in error as stockholders. That that firm may at some time have had some kind of a cause of action is immaterial. The firm of William T. Coleman & Co. were the *acceptors* of the bills in question; upon making such acceptance, they became the parties primarily liable to pay the bills, and could not maintain any action *on the bills* against the Alaska Improvement Company; the latter company, therefore, became liable to the defendant in error *as an indorser only;* that liability could only be enforced by the defendant in error by an action *on the bills*, and did not and could not accrue until after a demand for payment had been made on the acceptors, and payment had been refused, and notice of nonpayment had been given to the Alaska Improvement Company. It is apparent from this analysis,—which is merely the application to the facts of this case of the fundamental legal rules governing the relations of parties to bills of exchange,—that neither the corporate liability of the Alaska Improvement Company to the defendant in error, nor the individual liability of the plaintiffs in error here sought to be enforced, ever existed or ever could exist in favor of the firm of William T. Coleman & Co.; that it first became vested in the defendant in error, and that consequently the defendant in error does not sue thereon as an assignee.

The correctness of these conclusions was settled at an early day in the case of *Bullard* v. *Bell*, 1 Mason, 243. This action was identical, in every essential feature, with the present case. Like the present, it was an action brought by an assignee of certain choses in action, to wit, bank notes, made by a banking corporation, to enforce against the defendant, who was a stockholder of the bank, a liability imposed on him by statute for the debts of the bank.

Jurisdiction of the Circuit Court was invoked by reason of the diverse citizenship of the plaintiff and the defendant. The defendant moved to dismiss the suit on the ground of want of jurisdiction, for the reason that it did not appear that the plaintiff's assignor was qualified to sue in the Circuit Court. It was urged that the plaintiff was an assignee within the meaning of the provision of the statute of 1789, inhibiting assignees from suing in Federal courts when their assignors could not.

In overruling this contention, Judge Story said: "But the present action is not founded on any assignment. It is an original action created by the statute, between the present parties, and never had any existence between other parties. The debt which the plaintiff claims from the defendant is a sum which the latter never owed to any other person. It is a chose in action originally vested under the statute in the present plaintiff, and which has never been assigned. To be sure, a title to the bank notes stated in the declaration forms an ingredient in his case; but it is not all of his case. It is but matter of inducement to his action. How, then, is it possible for the Court to say that it has not jurisdiction of this case, when the parties are citizens of different States, and there never has been an assignment of the present cause of action, and the original parties in whom it first vested are before the Court? Neither the district judge nor myself has the slightest hesitation in overruling the motion."

As further illustrations of the rule that in order to render applicable the inhibitions of the statute against a suit by an assignee, the action must be founded on the identical chose in action assigned, and that the mere fact that the plaintiff derives title through an assignment or transfer of the subject-matter of the action is not sufficient to oust the jurisdiction, the following cases are in point:

See *Jewett* v. *Bradford S. B. & T. Co.*, 45 Fed. Rep. 801.

Bean v. *Smith*, 2 Mason, 268, 269.

Deshler v. *Dodge*, 16 How. 630, 631.

Marin Ins. Co. v. *St. Louis etc. R'y Co.*, 41 Fed. Rep. 645.

The views advanced in this brief with respect to the jurisdiction of the Circuit Court, were adopted by that Court in the two opinions which are annexed to this brief.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

CARTER P. POMEROY.
Counsel for Defendant in Error.

APPENDIX.

Bank of British North America v. Barling et al.

(Circuit Court, N. D. California. February, 1891.)

Hawley, J. (orally.) This is an action to recover from the defendants, as stockholders in the Alaska Improvement Company (a California corporation), the proportionate part of three certain inland bills of exchange drawn by said corporation, and is based upon the provisions of Section 322 of the Civil Code of California, which provides that "each stockholder of a corporation is individually and personally liable for such portions of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation." The bills were drawn by the corporation, and were made payable to its own order, on the firm of William T. Coleman & Co., and prior to their delivery were indorsed in blank by said corporation. After delivery, and before maturity, W. T. Coleman & Co., at the city of Vancouver, British Columbia, transferred and delivered them to the plaintiff, a foreign corporation. The bills, not having been paid at maturity, were protested, and notice given to the Alaska Improvement Company. This action was thereupon instituted against defendants. The defendants demur to the complaint upon the ground that this court has no jurisdiction of the person of the defendants or the subject of the action, in this:

"That the plaintiff sues as an assignee of a chose in action—to-wit: bills of exchange—which were drawn by a domestic corporation in favor of itself on William T. Coleman & Co., who were citizens and residents of the State of California; the drawer, drawee and payee of each of said bills of exchange being citizens and residents of the State of California."

The statute relative to the jurisdiction of the Circuit Court, in actions of this character, reads as follows:

"Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment or transfer had been made."

If this action is to be considered as an action by an assignee to recover the contents of a chose in action, then the first question to be determined is whether the bills of exchange are choses in action, payable to bearer. The rule in regard to commercial paper is to the effect that a bill or note made by a person payable to himself or to his order, if indorsed by him and delivered to another person, becomes, in legal effect, payable to the bearer, and may be so treated and declared on. They are designed to enable the holder to pass them without indorsement, and it seems to be simply a roundabout way of making the bill or note payable to bearer. Tied. Com. Paper, § 20; Daniel, Neg. Inst. § 130; *Bank* v. *Alley*, 79 N. Y. 536. In Tiedman on Commercial Paper the author says:

"In order that commercial paper may be negotiated without indorsement, and the consequent liability of indorsers, and yet avoid the commercial discredit of an indorsement 'without recourse,' it has become quite common for bills and notes to be made payable to the order of the drawer or maker, so that the named payee is the same person as the drawer or maker. The drawer or maker then indorses it in blank, and it is then transferred as if it had been made payable to bearer. Of course, two parties, distinct and separate, are as necessary to the negotiation of a bill or note as they are to the making of any other contract. In consequence of this necessity, it was once supposed that a note or bill would be invalid if the payee and the maker or drawer were one and the same person. But while it is manifest that such a bill or note is valueless, until it has been

transferred by indorsement to another person, because there has been no delivery, and consequently not a complete contract, as soon as it has been indorsed and delivered to the purchaser there are two distinct, separate parties to the contract, and the paper may be sued on as if originally made payable to bearer."

In the light of these authorities, I am of opinion that the bills of exchange must be treated and considered as having been made payable to bearer, and, having been made by a corporation, it follows that this court has jurisdiction of the case by the express provision of the statute above cited. *Newgass* v. *New Orleans*, 33 Fed. Rep. 196; *Rollins* v. *Chaffee Co.*, 34 Fed. Rep. 91; *Wilson* v. *Knox Co.*, 43 Fed. Rep 481; *Barnum* v. *Caster Co.*, 34 Fed. Rep. 91. This conclusion is not, as argued by defendant, opposed by any principle announced in *Rollins* v. *Chaffee Co.* There the Court said:

"The warrants being payable to the order of a person named therein, and passing only by indorsement, in the absence of averment that the assignors were qualified to sue in this court, we are without jurisdiction."

In that case the warrants were not made payable to the maker, and by it indorsed, but were made payable to another person. Here the bills were made payable to the maker, and by it indorsed in blank, and then delivered, and the bills, as thus delivered, under the rules applicable to commercial paper, must be treated as having been made payable to bearer. This case comes within the rule of *Barnum* v. *Caster Co.*, *supra*, where "the warrants, being payable to bearer, and made by a corporation, appear to be within the exception of the statute." The demurrer is overruled.

THE BANK OF BRITISH NORTH AMERICA, Plaintiff, v. HORATIO T. BARLING, et al., Defendants.

(Circuit Court, December 7, 1891.)

THE COURT. The facts of this case upon final hearing are substantially the same as stated in the opinion of this Court upon the demurrer, reported in 46 Federal Reporter, 357, the only difference being that it is now admitted that W. T.

Coleman & Co. transferred and delivered the bills of exchange to plaintiff in the State of Oregon instead of "at the City of Vancouver, British Columbia."

The objections to plaintiff's right of recovery is based upon the same ground as was raised by demurrer, viz: that the court has no jurisdiction of this case.

In the opinion of this Court upon demurrer, this case was considered as an action by an assignee to recover the contents of a chose in action, and it was said: "that the bills of exchange must be treated and considered as having been made by a corporation, it follows that this Court has jurisdiction of the case by the express provision of the statute." (46 Fed. Rep., 358). This case has been elaborately argued by counsel. I deem it unnecessary to restate the facts, or to again discuss the jurisdictional question upon this branch of the case. I still adhere to the views then expressed and am of opinion that the ruling of the Court upon demurrer is conclusive in favor of plaintiff's right to recover. There is, however, another view of the case which I will briefly notice. It is contended by plaintiff that this Court has jurisdiction because the plaintiff is suing to enforce a statutory liability, and does not sue as assignee "to recover the contents of a promissory note, or other chose in action" within the meaning of the restriction clauses of the Judiciary Act of 1887. If the right of action can be considered as being based upon the statutory liability of the defendants as stockholders in the corporation, then the fact of the assignment of the bills of exchange should be treated as a mere matter of inducement to plaintiff's cause of action. In deciding a question of its jurisdiction the Court should undoubtedly look to the immediate groundwork of the suit, not to any remote or collateral considerations in which it had its origin.

The principles applicable to this view of the case are clearly stated in the early case of *Bullard* v. *Bell*, 1 Mason 243. There the suit was brought by an assignee of certain bank notes made by a banking corporation, to enforce the statutory liability of the defendants who were stockholders in the bank. Jurisdiction was there, as here, invoked on account of the diverse citizenship of the parties, and the

defendants moved to dismiss the suit on the ground that the plaintiff was an assignee, and could not bring the suit without showing that his assignor could have brought the suit. Judge Story in answering the contention of defendants, said: "But the present action is not founded on assignment. It is an original action created by the statute between the present parties, and never had any existence between other parties. The debt, which the plaintiff claims from the defendant, is a sum which the latter never owed to any other person. It is a chose in action, originally vested under the statute in the present plaintiff, and which has never been assigned. To be sure, a title to the bank notes stated in the declaration forms an ingredient in his case; but it is not all of his case. It is but matter of inducement to his action. How then is it possible for the Court to say that it has not jurisdiction of this case, when the parties are citizens of different States, and there never has been an assignment of the present cause of action, and the original parties in whom it first vested are before the Court? Neither the District Judge nor myself have the slightest hesitation in overruling the motion."

In either view, that may be taken of this case, this Court has jurisdiction.

Plaintiff is therefore entitled to judgment for the amount sued for.

Let judgment be entered accordingly.

Circuit Court of Appeals for the Ninth Circuit.

HORATIO T. BARLING, ET AL,
vs.
BANK OF BRITISH NORTH AMERICA.

No. 32.
Filed April 23, 1892.

Error to the Circuit Court, Northern District of California.

(1.) STATE LEGISLATION — SUITS IN NATIONAL COURTS.

The Act of the California Legislature of April 1, 1876, entitled "An Act concerning corporations and persons engaged in the business of banking," does not prohibit such corporations or persons from maintaining actions in the National Courts; nor has the Legislature the power to do so; nor does the Act apply to business done by a foreign corporation, without the State.

(2.) NOTE PAYABLE TO BEARER.

A note made by a California corporation payable to itself and endorsed in blank and delivered to another is a note payable to bearer, and a foreign corporation who subsequently becomes the holder thereof, may maintain an action thereon in the National Court, sitting in California, against a citizen thereof, and may also maintain such action against such citizen who is a stockholder in such corporation, on the ground of his statutory liability for the debts of the corporation, even if said note is payable to order.

(3.) JURISDICTION.

A party against whom a judgment is rendered in a District or Circuit Court, may take the case to the Supreme Court directly on the question of jurisdiction, if the same is at issue, or the Circuit Court of Appeals on the whole case, and the Court of Appeals, may, if it sees proper, certify any question arising therein to the Supreme Court.

Mr. Daniel Titus for the Plaintiff in Error.

Mr. Carter P. Pomeroy for the Defendant in Error.

Before MCKENNA, GILBERT and DEADY.

Saturday, April 23, 1892.

DEADY, District Judge, delivered the opinion of the Court:

On April 5, 1888, the Alaska Improvement Company, a corporation formed under the laws of California, drew three bills of exchange on William T. Coleman and Company, citizens of the State of California, payable to itself, the first two in 60 days and the third in 90 days after date, for the sums of $2,740, $2,500 and $4,000, respectively, and on the same day endorsed the same in blank, and before maturity thereof transferred and delivered the

same to said Coleman and Company, who subsequently and before maturity thereof, in consideration of the amount of the face of said bills, paid them by the plaintiff, transferred and delivered the same to it in the State of Oregon, and on April 27, 1888, said bills were duly accepted by said Coleman and Company, who failed to pay them upon due presentation for that purpose, of all which the Alaska Company had notice and neglected to pay the same.

On April 8, 1890, this action was commenced in the Circuit Court by the plaintiff against the defendants, Barling and Eva, citizens of California, and stockholders in said Alaska Company, under Section 332 of the Civil Code of California, which provides that "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation?

The defendant Eva interposed a plea in abatement, to the effect that the plaintiff could not maintain the action, because it had failed to file the statements concerning its business, required by the California Act of April 1, 1876, entitled "An Act concerning corporations and persons engaged in the business of banking," which provides that no corporation or person "who shall fail to comply with the provisions of this law, shall maintain or prosecute any action or proceeding *in any of the Courts of this State,*" to which plea the plaintiff demurred, and the Court sustained the demurrer. 29 Fed, 610.

In this there was no error. The statutes only prohibits an action in the Courts of the State. Neither does it prohibit the transaction of banking business in the State, but simply provides that the parties failing to file the required statement shall be denied access to the Courts of the State. Nor is in the power of the State Legislature to prohibit the plaintiff from maintaining an action in this Court if it would.

While it is admitted that such Legislature may limit the right or capacity of a foreign corporation to do business or acquire property within the limits of the State, absolutely, or accept upon compliance with conditions precedent thereto, it is well established that it cannot in any way limit or restrain the jurisdiction of the National Courts. Orange National Bank vs. Travers, 7 Fed., 146; Union

Trust Co. vs. O'Brien, 2 Dil., 518; Railroad vs. Whitton, 13 Wall. 270.

But the defendant having pleaded over under Rule 9 of the Circuit Court is deemed to have waived the matter in abatement.

Besides the business of the purchase of these bills of exchange took place in the State of Oregon and beyond the jurisdiction of the State of California. The Act is intended to regulate business done in the State, and not otherwise.

Afterwards, on January 2, 1891, a demurrer was taken to the complaint on the ground that the Court had not jurisdiction of the defendants, because the plaintiff sued as assignee of certain bills of exchange, in which the drawer, drawee and payee are citizens of California.

The Circuit Court overruled the demurrer, 46 Fed. Rep. 357, and in this we find no error.

The demurrer was based on the provision in Section 1 of the Judiciary Act of 1888, which provides as follows: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be made payable to bearer and be not by any corporation, unless such suit might have been prosecuted in such Court to recover the said contents, if no assignment or transfer had been made."

And first, if this action is to be considered an action by an assignee to recover the contents of a chose in action the Circuit Court, nevertheless, had jurisdiction, because the bills were made by a corporation and payable to bearer.

The rule is this: a bill or note made by a person payable to himself or to his order, when endorsed by him and delivered to another becomes in legal effect payable to the bearer thereof, and may be so sued on. It is simply a roundabout way of making the paper payable to bearer. (Tied. Com. Paper Sec. 20; Dan. Neg. Inst., Sec. 130; Bank vs. Alley, 79 N. Y. 536.

But the present action is not really founded on an assignment of the bills, but on the liability created by said Section 322 of the Civil Code. In this action the assignment of the bills of exchange is a mere ingredient or inducement. By reason or means thereof, the plaintiff became and was a creditor of the Alaska Improvement Company. In this condition the statute operated and gave it a

right of action against the defendants, as stockholders of the corporation, for the amount of its claim against the latter.

This was an original right then created which did not exist before or otherwise. It never existed in favor of William T. Coleman and Company, the assignor of the plaintiff, but only in favor of the plaintiff against these defendants.

The case of Bullard vs. Bell, 1 Mason, 343, is a strong case in point. An assignee of certain choses in action, to-wit: Bank notes made by a banking corporation, brought an action against a stockholder of the bank to enforce a liability imposed upon him for the debts of the bank. The parties were citizens of different states, but the defendant objected that the Court was without jurisdiction, because it did not appear that the plaintiff's assignor could have maintained the action. In overruling this objection Mr. Justice Story said: "But the present action is not founded on any assignment. It is an original action created by the statute between the present parties, and never had any existence between other parties. The debt which the plaintiff claims from the defendant is a sum which the latter never owed to any other person. It is a chose in action originally vested under the statutes in the present plaintiff, and which has never been assigned. To be sure, a title to the bank notes stated in the declaration forms an ingredient in the case; but it is not all of his case. It is but matter of inducement to his action. How, then, is it possible for the Court to say that it has no jurisdiction of this case, when the parties are citizens of different states, and there never has been any assignment of the present cause of action, and the original parties in whom it first vested are before the Court? Neither the District Judge nor myself has the slightest hesitation in overruling the motion."

The defendants filed an answer denying the allegations of the complaint on information and belief. Said answer also contained a plea in bar of the action, which was nothing more than the demurrer filed to the complaint, to wit: That the plaintiff's assignor could not have maintained the action, and therefore the Court, under Section 1, of the Judiciary Act of 1888, was without jurisdiction.

On the trial, the Court gave judgment for the plaintiff; and in this there was no error.

It has been suggested by counsel for the plaintiff in error, that under Section 5 of the Act of 1891, we should certify this case to the Supreme Court on the question of jurisdiction, the same being

put at issue in the case by the demurrer to the complaint as well as the plea in bar. Said Section 5 provides, "That appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is at issue, in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court *below* for decision."

This Court of Appeals cannot be the "Court below" here meant. The statute is providing for appeals or error from the District and Circuit Courts and not the Court of Appeals, and the "Court below" must be one of these.

In McLish vs. Roff, 141 U. S., at page 668, the Supreme Court in considering this statute, say: "When that judgment (final) is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this Court." And this it would do under Section 6 of the Act of 1891, which gives this Court the power to certify questions of law to the Supreme Court, concerning which it desires instruction for its decision.

We do not think it necessary to certify so plain a question as the jurisdiction of the Circuit Court in this case to the Supreme Court for instructions.

The plaintiff in error might have taken the case to the Supreme Court on that question instead of to this Court upon the whole case.

The judgment of the Court below is affirmed.

I concur in the judgment.

McKENNA, Judge.